84-994 (1)

No.

Office-Supreme Court, U.S.
FILED
NOV 9 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

HENRY H. LINDSAY, Petitioner

vs

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NINO V. TINARI, ESQUIRE
1313 Race Street
Philadelphia, PA 19107
(215) 569-2551

QUESTIONS PRESENTED

1. Was there sufficient evidence presented by the United States against the Petitioner, Henry H. Lindsay, to support his conviction for conspiracy?

2. Was the appellant properly convicted of operating a continuing criminal enterprise?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HENRY H. LINDSAY, the petitioner prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above case on August 15, 1984.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania, Criminal No. 83-00218-01, was not reported.

The opinion of the Court of Appeals for the Third Circuit, No. 84-1146, was not reported either.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on August 15, 1984, and a Petition for Rehearing was denied on September 12, 1984. Copies of the said judgment and denial are attached to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. Sec 848, the so-called "king-pin" stature, provides, in pertinent part:

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if.....

(2) Such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter -

(A) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) From which such person obtains substantial income or resources.

STATEMENT OF THE CASE

The petitioner is a physician in Philadelelphia. Testimony at trial given by the government's witnesses alleged that the petitioner was involved in a systemmatic dispensing of prescription medication; this testimony was given by special agents of the Federal Drug Enforcement Agency (DEA), as well as from several of the people who allegedly assisted the appellant in selling these prescriptions. The government's so-called "inside" witnesses were all testifying under immunity and offered similiar stories.

Testimony given by Agent Gambrell, of the Office of the Attorney General of Pennsylvania, Burear of Narcotic Investigation, proved to be the most damaging to the petitioner. Agent Gambrell testified that she arranged to see the petitioner in

his office, with the help of a confidential informant. (N.T. 130, 10/20/83). Agent Gambrell further testified that this confidential informant, who was one of the petitioner's assistants, wrote out several prescriptions, and that the petitioner signed one of those prescriptions, corrected one error in them, and then signed the rest. (N.T. 134, 141, 10/20/83). Gambrell also testified that the petitioner did not examine her or ask about her medical history, and that he did not inform Agent Gambrell about the side effects of the prescribed drugs. (N.T. 151, 10/20/83).

Angeline Patterson testified that she and the petitioner had had an affair, and that in February, 1982, he asked her to work for him. (N.T. 5-6, 10/19/83). Mrs. Patterson also testified that to her knowledge, no one was ever examined by the

petitioner, and that she wrote at least 246 prescriptions which the petitioner signed. (N.T. 10, 10/19/83). Ms. Patterson also testified that six or seven other people were performing the same function as she was at various times. (N.T. 23, 10/19/83).

During the course of the trial, several other employees of the petitioner corroborated the testimony of both Angeline Patterson and Agent Gambrell. The informant who began the process of investigation did not testify at trial, however, after ceasing her cooperation with the government.

The petitioner testified that he had an affair with Angeline Patterson (N.T. 101, 10/24/83), and that the government's witnesses had worked for him as part-time receptionists and errand people. The petitioner also testified that the

exhibits found in his office did not belong to him, that he never taught others to write prescriptions or paid them for doing so, and that his prescription blanks were stolen and his signature had been forged. (N.T. 123, 10/24/83).

The petitioner was convicted of distributing and dispensing controlled substances, conspiracy to distribute and dispense controlled substances, continuing criminal enterprise, and aiding and abetting on October 25, 1983. Post-trial motions were heard and denied by the court on February 15, 1984. On March 2, 1984, the petitioner was sentenced to ten years of imprisonment for aiding and abetting, five years of imprisonment for distributing and dispensing controlled substances, to run concurrently with the ten year sentence, and five years probation for the conspiracy and continuing criminal enterprise convictions, to commence at the con-

clusion of the petitioner's incarceration.

The petitioner filed a notice of appeal with the District Court on March 12, 1984. On August 15, 1984, the Third Circuit Court of Appeals affirmed the District Court's decision. The petitioner then petitioned the appellate court for a rehearing, and that request was denied on September 12, 1984.

REASONS FOR GRANTING WRIT

The decision below should be reviewed because the evidence presented by the United States against the petitioner was insufficient to support a conviction for conspiracy, and because the petitioner was improperly convicted of engaging in a continuing criminal enterprise. In either case, this Court should grant review.

1. The crucial question in determining whether a conspiracy exists revolves around whether an agreement exists, and this is a question of fact for the jury to decide. United States v. Varelli, 407 F.2d 735 (7th Cir. 1969). Generally, it must be shown that the conspirators have a common goal or plan.

In the instant case, the testimony used by the government to show a conspiracy came mostly from paid immunized witnesses, all of whom were involved in the operation. Given the self-interest of these witnesses, then, there is insufficient evidence to support a conviction for conspiracy.

Conspiracy cannot be established by suspicions, and mere association does not make a conspiracy. United States v. Murray, 527 F.2d 401 (5th Cir. 1976). Hence, the issue is whether the evidence

actually showed an agreement between the petitioner and Jerome Hill, not whether they were merely associated with each other as seller and buyer. The petitioner submits that he was convicted of conspiracy based merely upon his sale to Hill and the jury's inference therefrom that the sale constituted an "operation." This fact alone clearly is not sufficient to support a conviction of conspiracy.

2. The statute aimed at preventing continuing criminal enterprises, 21 U.S.C. Sec. 848, was not intended to apply to the petitioner's situation; rather, this statute was aimed at those who control large, illicit drug operations stemming from the importation and distribution of non-medical controlled substances, specifically heroin, cocaine and

marijuana. The petitioner hardly fits the description of a drug underworld "kingpin," the type of person 21 U.S.C. Sec 848 was aimed at. Prior to his criminal conduct, the petitioner was operating a legitimate medical practice. Then, due to a variety of personal problems, including alcohol addiction, the petitioner slipped into the illegal sale of prescriptions; but this activity does not constitute a continuing criminal enterprise, meant to be prevented by 21 U.S.C. Sec. 848. Section 848 is aimed at the business of trafficking in prohibited drugs on a continuing, serious, widespread, supervisory and substantial basis. United States v. Sterling, 506 F.2d 1323, at 1344 (2d Cir. 1974).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NINO V. TINARI
Attorney for Petitioner
1313 Race Street
Philadelphia, Pa. 19107
(215) 569-2551

PROOF OF SERVICE

STATE OF PENNSYLVANIA:
SS.
COUNTY OF PHILADELPHIA:

MARK D. MUNGELLO, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

and depositing the same in the United States mails at Philadelphia, Penn-

sylvania on December 12, 1984.

MARK D. MUNGELLO,
Affiant

Sworn to and subscribed before
me this day of
,1984.

NOTARY PUBLIC

"APPENDIX A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1146

RECEIVED AND FILED
9-12-84
SALLY MRVOS
Clerk

UNITED STATES OF AMERICA

vs.

LINDSAY, HENRY H.

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: September 12, 1984

"APPENDIX B"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1146

UNITED STATES OF AMERICA

vs.

LINDSAY, HENRY H.

Appellant

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Criminal No. 83-00218-01
District Judge: Honorable Joseph S. Lord, III

Before: SEITZ, GIBBONS, and HUNTER, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted August 7, 1984.

On consideration whereof, it is now ordered and adjudged by this Court that the order of the District Court entered March 2, 1984 be, and the same is hereby, affirmed.

ATTEST:
Sally Mirvos
Clerk

RECEIVED AND FILED
8-15-84
SALLY MIRVOS
Clerk

August 15, 1984

United States of America vs.

DEFENDANT: HENRY H. LUBSEN

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET NO. Criminal 83-00218-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — R. Schaff, AUSA

MONTH	DAY	YEAR
03	02	84

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Nino V. Tinari, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

RECEIVED
MAR 14 1984
U.S.C.A. 3RD. CIR.

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. as to counts 1,2,3 & 4.

Defendant has been convicted as charged of the offense(s) of distributing and dispensing controlled substances-21:841(a)(1); conspiracy to distribute and dispense controlled substances-21:846; continuing criminal enterprise-21:848; aiding and abetting-18:2.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS on count 4. On count 1, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE(5) YEARS to run concurrently with the period of imprisonment imposed under count 4. On each of counts 2 and 3, the imposition of prison sentence is suspended and the defendant is placed on probation for a period of FIVE (5) YEARS to commence at the conclusion of the period of incarceration imposed under counts 1 and 4. The sentence of probation imposed under counts 2 and 3 shall run concurrently with each other.

SPECIAL CONDITIONS OF PROBATION

The defendant is continued on the same bail pending appeal.

FILED
MAR - 7 1984
MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, incarceration at Raybrook, New York or at Lexington, Kentucky where alcohlo rehabilitation programs are available.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

"APPENDIX C"

3-7-84 cc's:
AUSA
Def. Counsel
Dist. Marshal (2)

SIGNED BY [X] U.S. District Judge [ ] U.S. Magistrate

JOSEPH S. LORD, III, S.J. Date 3-2-84

BEST AVAILABLE COPY